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Supreme Court, U.S.
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OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

Jeffrey Alan Bade
Appellant, Petitioner
v.
Appellee, Respondent
Courtesy Oldsmobile Inc.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION

Whether the Court of Appeals disregarded the Federal Reserves Board's Mandate that the Truth in Lending Act's disclosures must given before a credit transaction is consummated through a credit contract that binds a consumer to credit, when it decided that the initial credit contract on which the consumer became obligated to the credit terms of the transaction, that did not disclose the finance charge, was not a failure to disclose as required by Section 1638(a) of the Truth in Lending Act?

LIST OF PARTIES

1. The Caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit.

2. Corporate Disclosure Statement. Courtesy Oldsmobile Inc. has stated that it has no parent corporations and that Courtesy Oldsmobile Inc. is not a publicly traded company.

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PETITION FOR A WRIT CERTIORARI

IN THE SUPREME COURT OF THE UNITED STATES

Jeffrey Alan Bade, Petitioner,

v

Courtesy Oldsmobile Inc., Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I. PETITION FOR WRIT OF CERTIORARI

Jeffrey Alan Bade the petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 15th, 2006.

II. OPINIONS BELOW

The March 15 ,2006 Opinion of the Court of Appeals whose judgment is herein sought to be reviewed, is unpublished, Case No. 03-16827 decided on March 15, 2006 and is reprinted in the Appendix to this Petition, Appendix A pp.1,2 and 3

The prior order of the United States District Court, District of Nevada, was entered on September 2, 2003 and is unpublished, District Court Case No. CV-02-00909-RLH, and is reprinted in the Appendix to this Petition at Appendix B pp.4,5,6,7

III. JURISDICTION

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. Section 1291 and rendered judgment affirming the District Courts Order awarding Summary Judgment to

respondent , on other grounds, on March 15, 2006.

The United States District Court for the District of Nevada, had federal question jurisdiction pursuant to 28 U.S.C. Section 1331 and 15 U.S.C. Section 1640(e).

On May 17, 2006 the Court of Appeals denied petitioner's timely March 27,2006 motion for panel and en banc rehearing and is attached at Appendix C pp. 9

Petitioner mailed this Petition for a Writ of Certiorari by prepaid First Class U.S. Mail on August 12, 2006 in timely compliance with Supreme Court Rule 13(1).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

IV. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

A. Federal-Statutes

15 U.S.C. 1600 et. seq. Truth in Lending Act

- 15 U.S.C. 1638 (a)(3)

1638 General Disclosure Provisions

(a)For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items to the extent applicable:

(3) The Finance Charge, not itemized, using that

term

B. Federal Regulations

15 U.S.C.A. Title 12, Code of Federal Regulation Following 1700, Section 226.1 et seq., regulation Z

- 15 U.S.C.A., 12 C.F.R. following 1700 Sec. 226.17(b)

Sec.226.17 General disclosure requirements

(b)Time of disclosures. The creditor shall make disclosures before consummation of the transaction.

-15 U.S.C.A., 12 C.F.R., Section 226.2(a)(13)

Sec. 226.2 Definitions and Rules of Construction

(a) Definitions

(13)Consummation means the time that a consumer becomes contractually obligated on a credit transaction.

-15 U.S.C.A., 12 C.F.R. Section 226.2 (26)(b)(4)

Sec. 226.2 Definitions and Rules of Construction.

(b) Rules of Construction. For purposes of this regulation, the following rules of construction apply:

(4) footnotes have the same legal effect as the text of the regulation.

V. STATEMENT OF CASE

On October 27, 2001 credit consumer, Jeffrey Alan Bade, petitioner, consummated a credit transaction with creditor, Courtesy Oldsmobile Inc., respondent, through a credit contract, exhibit one[1], that did not disclose the finance charge. The terms of the contract were a $1000.00 down payment, 24 payments of $ 372.56 a month, with the monthly payments starting on December 11th, 2001. After Bade paid the $1000.00 down payment the parties signed the contract. Subsequently, the parties signed a second contract with the same terms that did disclose the finance charge.

On October 31, 2001 petitioner paid what was owed on the credit contract(s), including the loan origination fees of $239.00 for bank & draft fees and credit reports.

On July 3, 2002 petitioner filed a lawsuit claiming that respondent had failed to disclose as required by the Truth in Lending Act: In a First Cause of Action "exhibit 1, for the above described transaction did not disclose the following information 1) the finance charge before contract consummation" and "The Defendant's failure to make the above-described disclosures was in violation of the

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[1] Exhibit one, R. Motion for Summary Exhibit H, Appendix D pp. 10,11

requirements of Title 15, United States Code, Section 1638(a) and Title 12, Code of Federal Regulations, Section 226.18"[2]

On July 15th, 2003 in a Motion for Summary Judgment, Courtesy argued that the transaction was not subject to the disclosure requirements of the Act. because "the Credit Application was taken solely as security" and "Since credit was never extended (by COURTESY or anyone else through assignment), there cannot, as a matter of law, be a violation of any Truth In Lending Act"[3]

On August 4, 2003 in opposition, petitioner challenged the legal theory that the transaction was not subject to the Act, arguing that "consummation", the time when Bade became contractually obligated to the credit terms on exhibit one made the transaction subject to the disclosure requirements of the Act.. "The TILA and Regulation Z (Reg Z) a disclosure Statute clearly define a consumer credit transaction.

Reg. Z. CFR 226.17 (2)(b)- Time of disclosures.

The Creditor shall make disclosures before consummation of the transaction.

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[2] P. complaint p.2, paragraphs 4,5

[3] R. Motion for Summary Judgment p.2

Reg. Z. CFR 226.2(a)(13)- Definitions.

"Consummation" means the time that a consumer becomes contractually obligated on a credit transaction."[4]

On September 2, 2003 the United States District Court for the District of Nevada, the Honorable Roger L. Hunt decided that the transaction was not subject to the disclosure requirements of the Act; "Defendant never processed Plaintiff's credit application nor extended any credit to Plaintiff. Thus, as a matter of law, there cannot be any violation of 15 U.S.C. Section 1638(a) because a transaction never transpired."[5] and accordingly awarded Summary Judgment to Courtesy.

On September 5, 2003 petitioner filed a notice of appeal.

On March 12, 2004 Bade's Opening Brief was filed maintaining that the contractual obligation imposed on Bade by the credit contract exhibit one made the transaction subject to the requirements of the Act. "The Court's in the afore cited case law, all the court's looked at when there was "consummation"" and " the court found that two separate contracts in the sell and finance of a fence, each would be

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[4] P. Opposition to Summary Judgment p.4

[5] District Court Order p.3; Appendix B. pp.4-8

liable for penalty because each was consummated"[6] and "absent some repugnance to the Truth-in-Lending Act (TILA), the Board's (Federal Reserve Board) regulation (Regulation Z) implementing this legislation should be accepted by the courts, as should the Boards interpretation of it's own regulation see; Ford Motor Credit Co. V. Milhollin, 444 U.S. 555, 100 S.Ct. 790, 63 L. Ed.2d 22 (1980)"[7]

On March 22, 2004 , Courtesy's's Answer Brief was filed accepting that consummation should determine if the transaction was subject to the disclosure requirements of the Act. "First Bade was never contractually obligated on the contract. It was never submitted or processed - i.e., it was never consummated"[8]

On April 7, 2004 petitioner's Reply Brief was filed arguing " Defendant errs in it's requirement/ Definition of 'consummation' requiring submission and/or processing of documents is a performance issue and consummation occurs by provision of the TILA and Regulation Z irrespective of the performance of either party.

15 U.S.C.A. 12 CFR 226.2(cc)a transaction shall be

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[6] P. Court of Appeals Opening Brief p. 4

[7] P. Court of Appeals Opening Breif p. 2

[8] R. Court of Appeals Answer Brief p.12

considered "consummated" at the time a " contractual obligation is created between a creditor and consumer irrespective of the performance of either party"[9]

On March 15, 2006 the Court of Appeals, the Honorable Three Judge Panel, William C. CANBY, Jr. and Robert A. BEEZER, Senior Circuit Judges and Alex KOZINSKI, Circuit Judge, assumed for it's Memorandum Order that the transaction was subject to the disclosure requirements of the Act but decided " summary judgment was still proper because Bade had not raised a genuine issue of material fact as to whether defendant failed to make any disclosure required by statute"[10]

On March 27, 2006 Bade filed a motion requesting panel and en banc rehearing asserting that the Court of Appeals March 15, 2006 order failed to defer to the interprepatation of the Board "The FRB considers this a separate transaction, subject to a separate statutory penalty"[11] and " the disclosure of the finance charge is missing, as stated in Bade's complaint in the First cause of action. Graves the FRB's

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[9] Court of Appeals P. Reply Brief p. 3

[10] Court of Appeals Order affirming Summary Judgment, p.2, Appendix A. pp 2

[11] P. Motion for Rehearing p. 7

interpretation of this exact issue of law and having the same effect as the text of RegZ should be accepted by this court"[12]

On May 17, 2006 the Court of Appeals, the Honorable Three Judge Panel CANBY, BEEZER and KOZINSKI, denied petitioner's motion for rehearing.(appendix C. pp.9)

VI. REASONS FOR GRANTING THE WRIT

SUMMARY ARGUMENT

Courtesy at the District Court nor on Appeal forwarded an argument that it had made the disclosures required by the Act (15 U.S.C. Section1638(a)). Courtesy's argument was that the disclosures were not required because Exhibit one was not subject to the disclosures of the Act. The Court of Appeals implicitly agreed.

The Court of Appeals should have implemented regulation Z's mandates requiring that the disclosures of the Act be given to the consumer before the consumer becomes contractually obligated to the credit terms of a transaction. Given it's decision that the creditor's failure to disclose the finance charge on the first contract, Exhibit one, that bound the credit consumer to the credit terms of the transaction was not a violation of the Act's disclosure requirements, the court should have consulted the complex and interrelated

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[12] P. Motion for rehearing p. 9

regulatory framework for the Act to determine if the Act's disclosures were required prior to the consummation of the transaction through Exhibit one. The Act has specific requirements for if and when the disclosures are required. That system allows consumers to make knowledgeable decisions between competing offers of credit.

Because the court's decision disregards regulation Z's requirements, creditors who may make better offers and who deserve to win in the marketplace would lose business to less efficient creditor's who would circumvent the competitive marketplace by binding the consumer to credit terms before disclosing the most important information, the finance charge, that the consumer could use to compare against competing offers of other creditors. Consequently, unless that decision is reversed, the Act's goal of strengthening our economy, through competition derived by the disclosure of readily comparable terms, will not be achieved.

The Federal Reserve Board's regulation prevents circumvention of the Act's goal of the informed consumer remaining free from obligation until he is informed of the dollar amount his credit will cost him, the finance charge. The Court of Appeals failed to follow the authoritative mandates of the Board by not requiring the creditor to disclose the dollar amount the consumer's credit would cost

him before he became obligated to the credit terms in a first contract. Its decision undermines the effectiveness of the Act's disclosures, and ultimately thwarts the market efficiency which this court has acknowledged as the Act's central purpose.

The Federal Reserve Board has addressed the same material facts as this case, where a creditor consummates two credit contracts in the financing of a single item and has held that the disclosures of the Act would be required prior to the consumer signing the first contract that obligates him to the credit terms of the transaction and further holds that the courts should disregard what a creditor nominates a contract and to look to whether the contract binds the consumer to credit terms as the first contract in the transaction did to Bade..

The Court of Appeals decision indicates that there is one credit transaction. That is inconsistent with the interpretation of the same material facts addressed by the Board in which the Board held that there are two separate credit transactions. If this court were to determine that there is only one transaction the disclosures of the Act would still be required by regulation Z before the initial obligation was imposed on Bade by Exhibit one.

The Court of Appeals decision does not mention and

implicitly rejects the Board's concept of consummation, and is inconsistent with the uniform application of the Board's concept of consummation by the Court of Appeals of several of the other circuits, and necessarily would and does result in the court's decision being inconsistent with the Appellate Courts' decisions cited herein. The other Circuits application of the Board's regulation that would focus on whether the disclosures were given to the consumer before he became obligated to credit terms, precludes circumvention of the Act, in contrast the undisclosed application that would not require the disclosures until after the creditor contractually obligates the consumer on a second contract would invite circumvention of the Board's scheme of enforcement. If the disclosures are required after the consumer signs a credit contract then the creditor can withhold the Act's disclosures until after the consumer has accepted the credit terms. This aspect of the Court of Appeals decision violates the fundamental purpose of the Act and would deny all consumers the ability to use the Act's disclosures to shop for the best credit terms.

ARGUMENT

IF THE FIRST CREDIT CONTRACT SIGNED BY MR. BADE CONSTITUTED A CONSUMMATION OF A CREDIT TRANSACTION, THE COURT OF APPEALS ERRED BY DETERMINING THAT COURTESY HAD NOT FAILED TO DISCLOSE AS REQUIRED BY THE

ACT, SECTION 1638(a)(3)

A. When to provide the Act's disclosures in a consumer credit transaction is extremely important to preventing circumvention of the Act's primary purpose of avoiding the uniformed use of credit.

1. Regulation Z's provisions that mandate disclosure of the finance charge before consummation of a credit transaction implements an important policy of the Act by ensuring the informed consumer is free to choose the best credit offer.

*As set forth in Bade's complaint[13] the first credit contract in the transaction, Exhibit one[14], does not disclose the finance charge, a required disclosure of the Act;

"For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items to the extent applicable:

(3) The finance charge, not itemized, using that term[15]

. *If the credit contract, exhibit one, is subject to the disclosure requirements of the Act, then Courtesy has failed to disclose the finance charge as required by the Act.

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[13] P. complaint p. 2 , paragraphs 4,5

[14] exhibit one, Appendix D pp.10,11

[15] 15 U.S.C. Section 1638(a)(3),

" we look to Regulation Z to determine whether a claim is one to which the TILA should apply."[16]

"Time of disclosures. The creditor shall make the disclosures before consummation of the transaction...."[17]

"Consummation means the time that a consumer becomes contractually obligated on a credit transaction"[18]

If Bade became contractually obligated to the credit terms on exhibit one, a $1000.00 down payment[19], 24 payments of $ 372.56 a month, with the monthly payments starting on December 11th, 2001 then, under the Act, the transaction was consummated and the contract would be subject to the Act's disclosure requirements.

State Law determines when a contractual obligation is created that binds a consumer to credit terms[20]

Exhibit one meets the formal requirements of Nevada State's Statute of Frauds requiring:

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[16] Fairley v. Turan-Foley Imports Inc. 65 F.3d 475, 480 (5th Cir. 1995)

[17] 15 U.S.C.A., 12 C.F.R. following 1700, Sec. 226.17(b)

[18] 15 U.S.C.A. 12 C.F.R. following 1700 Sec. 226.2(a)(13)

[19] Bade had paid the down payment before signing exhibit one

[20] 15 U.S.C.A. 12 C.F.R. Sec. 226, Supp. 1, Official Staff Interpretations, Section 226.2(a)(13)

" some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought", to make an enforceable contract.[21]

Bade, the party whom against enforcement of the credit terms would apply, did sign exhibit one, "I hereby agree to purchase from you the following:"[22], as did Courtesy's authorized representative, the finance manager, obligating Courtesy to supply that credit.

The above cited authorities support Bade's claim that exhibit one, through consummation, is subject to the disclosure requirements of the Act and that Courtesy failed to disclose the finance charge as required by 15 U.S.C. Section 1638(a)(3) of the Act .

2. The Court of Appeals fundamentally erred by not applying the existing requirements of Regulation Z to determine if Act's disclosures were required before Bade signed the contract.

As reflected in its decision the Court of Appeals did not mention nor apply regulation Z to determine if and when

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[21] . Nevada Revised Statutes 104.2201(1), Statute of Frauds-Formal requirements.

[22] Exhibit one Appendix D. pp.10,11

the Act's disclosures would be required. Regarding the Act, the federal judiciary is ill equipped to substitute its judgment through statutory interpretation for the legislative and regulatory decisions made by Congress and the Board: "[J]udges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme" Ford Motor Credit Company v. Milhollin 444 U.S. 555, 565 (1980)

The Court of Appeals fundamentally erred by substituting its own ideas in place of detailed and comprehensive system set out by the Board in Regulation Z, by not accepting that the disclosures of the Act would be required " before consummation". Under the Court's decision disclosures would not be required until after Bade was already obligated to credit terms. In this way, no creditor will need to allow a consumer to knowledgably shop for credit, and no consumer would have possesion of the Act's most important disclosure, the finance charge, that facilitates the consumer's ability to compare credit terms. This "blind economic activity is inconsistent with the efficient functioning of a free economic system such as ours, whose ability to provide desired materials at the lowest cost is dependant on the asserted preferences and informed choices of consumers." Mourning v. Family

Publications Services, Inc., 411 U.S. at 364, 36 L. Ed 2d 318, 93 S. Ct. 1652(1973)..

For these reasons, Exhibit one was consummated and disclosure of the finance charge was required before the contract was signed by Bade. Conformity with Board's implementing regulation here is more compelling than in Milhollin, where the Board's opinion was needed to "fill an interstitial silence." Milhollin, at 565. Here, regulation Z expressly mandates disclosure of the finance charge, 15 U.S.C. Section 1638(a)(3), " before consummation". The Board's interpretation of its concept of consummation supports a strict, unembellished, literal reading of Regulation Z's express mandate that requires disclosure before consummation.

The Court's decision that is contrary to that process rejects the preference of this Court for administrative deference under the Act, and amends Regulation Z by judicial interpretation. If allowed to stand, that decision will have far reaching and unintended consequences for the entirety of the Act, precisely as the this court warned. The Court of Appeals decision has an unintended negative impact on the most fundamental purpose of the Act, by allowing the disclosures to be given "after" consummation it allows creditors to withhold the Act's disclosures until after the

uninformed consumer has agreed to credit terms. Unless the Board's comprehensive system mandating if and when disclosures are required is applied, multiple contracts will be used by creditors to circumvent competition in the marketplace by withholding the disclosures that allow the informed consumer to compare and shop , thus allowing a creditor to avoid any risk that the consumer would find the dollar amount his credit would cost him unacceptable and thus denying Courtesy's competitors an opportunity to compete with better terms.

3. The Court of Appeals Decision is inconsistent with the Act's primary source of interpretation, the Federal Reserve Board, that supports disclosure before consummation.

The Board is authorized by the Act to set forth regulations to assist in the enforcement of the Act's provisions and is it's "primary source"[23]of interpretation. One of the most effective ways used by the Board to interpret it's implementing regulation are footnotes.

Rules of Construction-

(b) For purposes of this regulation, the following rules of construction apply:

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[23] . Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 100 S.Ct. 790, 63 L. Ed. 2d 22 (9th Cir 1980).

(4) Footnotes have the same legal effect as the text of the regulations.[24]

Board Official Staff Commentary-.01 Comment 2(b)[25]- 1. Footnotes. Footnotes are used extensively in the regulation to provide special exceptions and more detailed explanations and examples. Material that appears in a footnote has the same legal weight as material in the body of the regulation.

On the concept of consummation the Board has been unequivocal that the defining issue is did the contract in question obligate the consumer to credit terms.

" In it's brief, Tru- link emphasizes the fact that the term "proposal" is used in the Fencing Proposal ....the court finds that the use of the term "proposal" does not negate the clear language in the Fencing Proposal that creates a binding contractual obligation....having found that the Fencing Proposal constitutes a consummation of a credit transaction"[26] Bade cited Graves on appeal " The court found that two separate contracts in the sell and finance of a fence,

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[24] 15 U.S.C.A. following 1700, 12 C.F.R. Sec.226.2(b)(4)

[25] CCH Consumer Credit Guide 3212-.01 Comment 2(b)-1

[26] 15 U.S.C.A. following 1700 C.F.R. 226.2 definitions, footnote 6, consummation p.347 ; P. Motion for rehearing p.8 *see.Graves* v. Tru-Link Fence Company 905 F. Supp 515(N.D. Ill. 1995)

each would be liable for penalty because each was consummated"[27]

Graves is indistinguishable from this case on the question; is exhibit one subject to the disclosure requirements of the Act. In Graves, the credit consumer was financing a single item, a fence. The creditor obligated the consumer to the same credit terms on two separate contracts on which the consumer abandoned both contracts paying no monies on either[28].

The Court used the literal definition of consummation and only needed to determine if the consumer was obligated to the credit terms in the contract in when he signed it.

Courtesy's use of the term " purchase order" does not negate the clear language in exhibit one that created a contractual obligation on Bade.

The Board would require the disclosures of the Act to be made before exhibit one was Bade signed it.

"Court finds plaintiff was contractually bound to price and credit terms stated in the fencing proposal when she and Tru-

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[27] P. Court of Appeals Opening Brief p. 4

[28] Bade was required to pay $239.00 in bank & draft fees and credit report fees (loan origination fees) to fulfill his contractual obligation Courtesy in the credit transaction

Link's representative signed the document. Therefore, under TILA, the court finds that Tru-Link was obligated to make all required TILA and Regulation Z disclosures" [29]

The Board, to prevent circumvention of the Act's primary purpose " to .. avoid the uniformed use of credit"[30] considers Exhibit one, which has the uniformed consumer contractually obligated to the use of credit, to be a separate transaction from any subsequent credit contract(s)."second contract for purchase of furniture constituted a separate transaction for purposes of liability under TILA, notwithstanding that both of such contracts merged into a final contract."[31]

4. The Court of Appeals decision is inconsistent with other Appellate Court decisions that have applied regulation Z's concept of consummation to determine if and when the Act's disclosures are required.

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[29] 15 U.S.C.A. 1640 Civil Liability footnote 17 number of violations p. 655 *see.Graves* v. Tru-Link Fence Company 905 F. Supp 515(N.D. Ill. 1995)

[30] Mourning at 356, 377

[31] 15 U.S.C.A. 1640 Civil Liability, footnote 17 number of violations p.655 *see.* Wise Furniture v. Dehning No. 343 N.W.2d 26, Supreme Court of Minnesota (1984)

In one case, "the credit consumer did nothing but sign a credit contract, hoping to get credit, was informed by the creditor that it could not obtain credit for her."[32], and the contract was mutually terminated. "the courts have uniformly allowed such penalties as to 'consummated' consumer transactions, despite the circumstance that credit was not actually extended."[33]

In another case, the Court of Appeals held that: "The fact that the parties to a credit agreement abandoned the transaction and the creditor refunded the borrower's money was insufficient to relieve the creditor of liability for failure to make required disclosures"[34] and "A TILA violation occurs, with respect to a closed end transaction... when credit is extended through consummation without the required disclosures being made"[35]

The Court of Appeals' decisions cited above disregarded

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[32] P. Reply Breif p 4,See; Davis v. Werne 673 F.2d 866 at 870 (1982)

[33] Davis v. Werne 673 F.2d 866 at 870 (1982)

[34] P. Opening Breif p. 4 see; Dryden v. Lou Budke's Arrow Finance Co., 630 F.2d 647 at 642 (1980)

[35] P. Opening Brief p. 5 see; Dryden v. Lou Budke's Arrow Finance Co., 630 F.2d 647 at 642 (1980)

post-consummation events in determining if a contract was one to which the Act's disclosures would be required. The Courts' reasoning would also disregard a post-consummation event of a second contract as, reflected in those decisions "it is the duty to disclose… toward which the TILA is directed"[36] A subsequent second contract would not offer a post-consummation remedy to Courtesy's failure to disclose before consummation of a first contract, Exhibit one. The decision of this Court of Appeals is inconsistent in that it disregards a consummated credit contract.

5.. Courtesy cited no authorities in support of exhibit one not being subject to the Act's disclosure requirements.

Courtesy's argument when applied to Exhibit one, and Bade's first cause of action is readily defeated by all authorities cited above. Respondent's argument in full:

"1. There Was Never A "Credit Transaction" Subject To The Truth In Lending Act

15 U.S.C. Section 1638(a) provides that certain disclosures must be made whenever there is a Consumer Credit Transaction. As set forth above, however, the Credit Application was taken solely as security in the event that the

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[36] P. Opening Breif p. 3,4 see. Burgess V. Charlottesville Savings & Loan Ass'n 477 F2d 40, 44-45(1973)

Plaintiff to provide the remainder of the purchase price by cash, check or credit card when he re-appeared at the dealership on October 31, 2001. Since credit was never extended (by COURTESY or anyone else through assignment), there cannot, as a matter of law, be a violation of any "Truth In Lending" Act. Accordingly, this Court must enter judgment in favor of COURTESY on Plaintiff's First and Second Causes Of Action."[37]

Courtesy's only citation of authority does not support it's position that the transaction was not subject to the Act. 15 U.S.C. Section 1638(a) addresses "what disclosures" are required by the Act not the threshold question Courtesy forwards of "whether the disclosures" were required.

Accepting that Courtesy's opinion met it's intial burden cited by the District Court "The moving party for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970)" (Appendix B pp.5) Bade forwarded the facts and applicable regulatory authorities that demonstrated that exhibit one constituted a transaction that would be subject to the Act.

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[37] R. motion summary judgment p.4

"FACTS SUPPORTING THAT IT WAS A CREDIT TRANSACTION- DEF MOTION EXHIBIT F[38]

1. This contract described on reverse side as a credit contract
2. The Defendant states the annual percentage rate, length of loan, down payment and the amount of monthly payment
3. Contract has a holder clause used in consumer credit contracts and required by Federal law
4. The contract is signed by both parties
5. Contract meets the Nevada statute of frauds, making enforceable contract

The TILA and Regulation Z (Reg Z) a disclosure Statute clearly define a consumer credit transaction.

Reg. Z. C.F.R. 226.17 (2)(b)- Time of disclosures. The Creditor shall make disclosures before consummation of the transaction.

Reg. Z. C.F.R. 226.2(a)(13)- Definitions. "Consummation" means the time that a consumer becomes contractually obligated on a credit transaction."[39]

Courtesy in it's Reply failed to address the authorities in Bade's Opposition to Summary Judgment. Courtesy did not address why Exhibit one, under regulation Z, did not constitute the consummation of a credit transaction when Bade and Courtesy's authorized representative, the finance

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[38]exhibit one, R. motion for summary judgment Exhibit F, Appendix D pp

[39] P. opposition to summary judgment p.

manager signed it. A genuine and material issue of law raised by Bade in his Opposition to Summary Judgment.

Courtesy, in reply, cites Mourning v. Family Publications Services, Inc., 411 U.S. 356, 36 L. Ed 2d 318, 93 S. Ct. 1652(1973).[40] In citing Mourning Courtesy avoided citing this Court's position on the question here for review;

"By erecting a barrier between a seller and prospective purchaser in the form of hard facts, Congress expressly sought ' to … avoid the uniformed use of credit.'"[41] The Act's most important hard fact is the finance charge. Review of the record reveals that Courtesy nor the Court of Appeals nor the District Court applied or deferred to regulation Z as this Court did in Mourning.

Review of the record reveals that Bade did apply and rely on regulation Z as this Court did in a Mourning.

On Appeal Courtesy did address the concept of consummation by mis-citing a Court of Appeals decision: "(finding no liability under TILA where the underlying transaction was never consummated); Streit v. Fireside Chrysler-Plymouth, Inc., 697 F.2D 193, 196 (7th Cir. 1983).[42]

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[40] R. Reply- motion for summary judgment p. 3

[41] Mourning id.,411 U.S. 356, 377 93 S.Ct.1652 at 1664.

[42] R. Answer Breif p. 3

That citation set forth by Courtesy[43] can not be reasonably derived from the court's decision. The Court of Appeals for the Seventh Circuit held that:

" The company contends that the credit transaction was not consummated because Continental Bank never executed the finance contract"

".., but we disagree with the district court that the financing agreement was not consummated for the purposes of the Act."[44].

Courtesy's cited decisional law directly addresses and defeats Courtesy's opinion. "First Bade was never contractually obligated on the contract. It was never submitted or processed - i.e., it was never consummated"[45] Courtesy's definition of consummation directed towards the "time that a creditor submits or processes(or executes) documents" is always different from the "time that a

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[43] Petitioner does not dispute that a transaction must be consummated for there to be liability, as reflected in his opposition to summary. That concept was not forwarded nor addressed by respondent at the District Court and on appeal Courtesy does accept consummation as pertinent.

[44] P. Court of Appeals Reply Breif p. 3

[45] R. Court of Appeals Answer Brief p.12

consumer becomes obligated to a credit transaction" and that post-consummation event is held to be irrelevant by Courtesy's cited decisional law.

6.The Court of Appeals Order is inconsistent with this Court's prior decisions requiring substantial deference to the Act's implementing regulations .

This Court, recently reiterated it's long held position of required deference to regulation Z and the Board's interpretation of that regulation, "unless manifestly contrary"[46] to the Act.

The Court of Appeals March 15, 2006 order does not indicate that the Court applied to the Board's regulation that expressly mandates that consummation should determine if and when the Act's disclosures are required . It is implicit the Court did not. This Court found that implicit rejection of the Board's contrary interpretation of the statute unacceptable in a previous Ninth Circuit Court of Appeals case:

"Implicit in the conclusion of the Court of Appeals... was the rejection of a contrary administrative interpretation

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[46] Household Credit Services, Inc. v. Phenning, 541 U.S. 232, 124 S. Ct. 1741, 158 L. Ed. 2d 450 (2004).*also see;* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 100 S.Ct. 790, 63 L. Ed. 2d 22 (1980).

of the pertinent statutory and regulatory provisions. In adopting it's particular approach, the Court of Appeals mapped a path through the disclosure thicket that diverges from the routes traveled by the Courts of Appeals for several other circuits."[47]

8.The Court of Appeals' decision would render the Act ineffective to it's purpose by attacking the Act's core concepts that are intended to enhance competion.

The Court of Appeals decision that implicitly rejected regulation Z and the Board's guidance in implementing it's scheme of enforcement does great violence to the Act by attacking the Act's core concept; that the consumer receive the disclosures required by the Act "before" becoming contractually obligated.

If allowed to stand, creditors will inevitably, as a prudent business practice, engage in obligating the consumer to credit terms, before disclosing the finance charge, to avoid any risk that disclosure of the finance charge, the dollar amount the credit will cost, would be unacceptable to the consumer.

This Court should soundly foreclose on this circumvention of the Act, in support of the Board and it's

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[47] *see;* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 100 S.Ct. 790 at 793 63 L. Ed. 2d 22 (9th circuit) (1980).

scheme of enforcement and lay to rest any misunderstanding that a creditor can circumvent the requirements of theAct by contractually obligating a consumer to credit terms without having first disclosed the finance charge as required by 15 U.S.C. Section 1638(a).

VII. CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

This 12th day of August, 2006

Jeffrey Alan Bade
4544 Tule Drive
Topock, Arizona 86346
(928)202-8338
In person

STATE. ARIZONA
COUNTY: MOHAVE
8/12/06

Laura L Wilson
NOTARY PUBLIC

OFFICIAL SEAL
LAURA L. WILSON
NOTARY PUBLIC - State of Arizona
MOHAVE COUNTY
My Comm. Expires April 18, 2010

APPENDIX

FILED MAR 15 2006
CATHY A. CATTERSON,CLERK
U.S. COURT OF APPEALS

Not For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY ALAN BADE
Plaintiff- Appellant,

v.

COURTESY OLDSMOBILE, INC.,
Defendant- Appellee

Appeal from the United States District Court for the District of Nevada Roger L. Hunt, District Judge, Presiding

Submitted March 8, 2006**

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

Jeffrey Allan Bade appeals pro se from the district court's summary judgment dismissing his action alleging claims under the Truth-in-Lending Act ("TILA") and various state laws. We have jurisdiction pursuant to 28 U.S.C.

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2)

(Page 1)

We review a grant of summary judgment de novo, and we may affirm on any grounds supported by the record. *Enlow v. Salem-Keizer Yellow Cab Co.,* 389 F.3d 802, 811 (9th Cir.2004).

The district court granted summary judgment on Bade's TILA claims because it concluded defendant dealer never extended credit to him, and so TILA did not apply to Bade's cash purchase of a used truck. *See*15 U.S.C. Section 1602(e) (defining term "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment"); 15 U.S.C. Section 1638(b)(1) (providing that disclosures required by TILA "shall be made before the credit is extended"). Assuming *arguendo* that Bade entered into a credit transaction with defendant dealer, summary judgment was still proper because Bade did not raise a genuine issue of material fact as to whether defendant failed to make any disclosure required by statute. *See* 15 U.S.C Section 1638(a) (setting forth required disclosures). The district court did not abuse its discretion in declining to exercise supplemental jurisdiction over Bade's state-law claims. *See* 28 U.S.C. § 1367(c)(3) (district court may decline supplemental jurisdiction if it has "dismissed all claims over which it has original jurisdiction"); *Acri v. Varian*

Associates, Inc., 114 F.3d 999, 1001 (9th Cir. 1997) (en banc) (describing factors district court should consider in declining supplemental jurisdiction). Bade's remaining contentions lack merit. **AFFIRMED.**

(Page 3)

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY ALAN BADE
Plaintiff- Appellant,

No. 03-16827
D.C. No. CV-02-00909-RLH

v.

COURTESY OLDSMOBILE, INC.,
Defendant- Appellee

JUDGMENT

Appeal from the United States District Court for the District of Nevada (Las Vegas).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Las Vegas) and was submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered 03/15/06

___Filed __RECEIVED x FILED
__x_Entered _x SERVED
SEP- 3 2003 2003 Sep-2 P 4:17
BY: SS/: MJ DEPUTY BY: SS/: MJ DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
***

JEFFREY ALAN BADE, CV-S-02-0909- RLH
Plaintiff(s) (PAL)

vs.

ORDER

COURTESY OLDSMOBILE, INC., (Motion for Summary Judgment- # 97)

Defendant(s)

Before the Court is Defendant's **Motion for Summary Judgment** (#97), filed July 15, 2003. The Court has also considered Plaintiff's Opposition (#100), filed August 4, 2003, and Defendant's Reply (#102), filed August 18, 2003.

BACKGROUND

Plaintiff has filed a nineteen-count complaint against Defendant, the first two counts of which state federal cause of action and the remainder state causes of action. Plaintiff's complaint arises out of his purchase of a used motor vehicle from Defendant. The first two causes of action allege

violations of the Consumer Credit Protection Act. The remainder contain various allegations of breach of contract, various forms of fraud or deceit, false advertising and malice.

DISCUSSION

Pursuant to Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

(Page 1)

show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law."

The moving party for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970); *Zoslaw v. MCA Distrib. Corp.,* 693 F.2d 870, 883 (9th Cir. 1982). Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence that would otherwise be necessary to show that there is a genuine issue for

trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475-U.S. 574, 586-87 (1986); *California Arch. Bldg. Prod. v. Franciscaqn Ceramics.* 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied,* 484 U.S. 1006 (1988).

If the party seeking summary judgment meets its burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. *First National Bank of Airz. V. Cities Serv. Co.,* 391 U.S. 253, 290 (1968); *Commodity Futures Trading Commission v. Savage,* 611 F.2d 270, 282 (9th Cir. 1979). Parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *British Airways Bd. v. Boeing Co.,* 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979). Likewise, "legal memoranda and oral argument are not evidence and they cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion where no dispute otherwise exists. " *British Airways Bd.,* 585 F.2d at 952.

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *See S.E.C. v. Seaboard corp.,* 677 F.2d

677 F.2d 1289. 1293 (9th Cir. 1982); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982).

(page 2)

All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. *Poller v. CBS, Inc.*, U.S. 464, 473 (1962). After drawing inferences favorable to the respondent, summary judgment will be granted only if all reasonable inferences defeat the respondent's claims. *S.E.C. v. Seaboard Corp.*, 677 F.2d 1297, 1298 (9th Cir. 1982).

A. <u>Consumer Credit Protection Act</u>

Plaintiff's First and Second Causes of Action are for alleged violations of the Consumer Credit Protection Act. 15 U.S.C. § 1638(a) provides that certain disclosures must be made whenever there is a Consumer Credit Transaction. On October 27, 2001, Defendant had Plaintiff fill out a Credit Application that was taken as security in the event that plaintiff failed to provide the remainder of the purchase by cash, check or credit card when he returned to collect the vehicle at the dealership on October 31, 2001. Plaintiff returned on October 31, 2001, with the remainder owed on the vehicle and accordingly, Defendant never processed Plaintiff's credit application nor extended any credit to Plaintiff. Thus, as a matter of law, there cannot be any

violation of 15 U.S.C. § 1638(a) because a transaction never transpired. Judgment will therefore be entered in favor of Defendant on Plaintiff's First and Second Causes of Action.

B. State Law Claims

28 U.S.C. 1367(c)(3) states that the district court may decline to exercise jurisdiction if it has "dismissed all claims over which it has original jurisdiction..." The law outlined above establishes there are no actionable federal claims against the Defendants and therefore, this Court declines to exercise any jurisdiction over the state law claims. Plaintiff may pursue these matters against the Defendant in the proper state forum.

(page 3)

CONCLUSION

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment (#97) is GRANTED as to Plaintiff's First and Second causes of Action. IT IS FURTHER ORDERED that Plaintiff's remaining state law claims are DISMISSED without prejudice, for lack of jurisdiction.

Dated: September 2, 2003.

(page 4)

FILED
MAY 17 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY ALAN BADE
Plaintiff- Appellant,

v.

COURTESY OLDSMOBILE, INC.,
Defendant- Appellee

No. 03-16827
D.C. No. CV-02-00909-RLH

ORDER

Before: CANBY, BEEZER, and KOZINSKI, Circuit judges

The panel has voted to deny appellant's petition for panel rehearing. Judge Kozinski has voted to deny the petition for rehearing en banc, and Judges Canby and Beezer so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed appeal

VEHICLE PURCHASE ORDER

to

COURTESY

5800 WEST SAHARA AVE * LAS VEGAS, NV. 89146

Date of Delivery 10/27/01

Salesman 1 Pasqale Villardi

Purchaser JEFFREY A BADE or

Address 4940 Gold Field ST

City Las Vegas State NV 89130 Zip Phone(702)649-4276

I hereby agree to purchase from you the following:

Year 1994 Make TOYOTA TRUCK Model 4 RUNNER

Body Type SUV Stock No. P9339A

Vehicle No. JT 3N29V1R0037772 Color Miles

Vehicle Selling Price.....$7492.00

TOTAL VEHICLE PRICE.....7492.00

Documentation Fees.....$289.00

D.M.V. Fees...Smog Fees.....47.50

Sales Tax.....562.49

TOTAL CASH PRICE.....8340.99

Deposit.....N/A

Cash Due on delivery.....1000.00

Net Used Vehicle Allowance.....N/A

TOTAL CREDITS.....(1000.00)

AMOUNT DUE AFTER DEPOSIT..$ 7340.99

24 PAYMENTS OF 372.56 STARTING 12/11/01

APR__ CUSTOMER SS/: Jeffrey Alan Bade

APPROVALS SS/: Chacko Punken

Authorized Representative of Dealer

N/A

TRANSACTION SUBJECT TO MANAGEMENT APPROVAL